APPEAL NO. 93165

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On December 16, 1992, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues presented and agreed upon were: 1. What is the date of claimant's injury? 2. Does the Commission have jurisdiction to resolve the claim? The hearing officer determined that the appellant (claimant) sustained an occupational disease in the course and scope of her employment and knew or should have known that her wrist problem may be related to her employment on (date of injury). Claimant contends that the hearing officer misapplied the facts, the law, and the argument presented at the hearing, and requests that we reverse the hearing officer's decision and find that claimant knew or should have known that her wrist problem may have been related to her employment as of December 1990. Respondent (carrier) responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

The basic facts are not in dispute. Claimant worked as a benefits service representative for (employer). Claimant testified she had worked for the employer since 1982, first as a key punch operator, and then as a benefit service representative. In her position, claimant would receive approximately 198 calls a day and would use typing skills to enter and retrieve information from the computer. Claimant testified she started having trouble with her right hand in December of 1990. Around that time, claimant testified, she developed a knot on her right hand. She discussed the knot with coworkers but did not miss any time from work. Claimant states her hand continued to bother her and she went to (Dr. P) her family physician on February 26, 1991. Dr. P referred claimant to (Dr. De) who removed a ganglion cyst from claimant's right wrist on March 1, 1991. Claimant did not miss any time from work for this procedure. Claimant testified that her hand/wrist got better for a time but then started getting worse. On (date), claimant testified her wrist began to swell and the pain became so severe she when to the ER of the local hospital for medical attention. Claimant states she reported the hand problem to her supervisor the following morning (July 3rd) and received permission to be off work. Claimant was examined by several doctors and ultimately was diagnosed as having carpal tunnel syndrome in mid-July 1991. It is undisputed that claimant advised her employer that she considered the carpal tunnel syndrome to be work related. The employer adjusted claimant's sick leave balance and provided benefits under employer's non-subscriber program. Claimant had carpal tunnel surgery in September 1991. Claimant testified she has continued to have problems even after the surgery and is being treated for reflex sympathetic dystrophy, emotional problems and does not consider herself able to work.

Additional facts, either documented or testified to by the employer, having some bearing on the case are that claimant had another cyst removed from her right hand/wrist in

1985. The employer had worker's compensation coverage with the carrier from July 1, 1990 through June 30, 1991 and thereafter the employer had a non-subscriber program through Employees Retirement Income Security Act (ERISA). Claimant has received benefits under that program. Claimant was considered a good employee and had received a promotion in May 1991 (two months before she began to have extensive time off because of her wrist problem). Claimant filed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) on "01-17-92" stating in block 16, that she first knew the disease was work related on "7-02-91." Claimant filed an Amended Notice of Injury (using an old pre-1989 Act form) on "9-22-92" showing "Date of First Knowledge Disease was Work Related (date) . . . ." The hearing officer's pertinent findings of fact and conclusions of law were:

FINDINGS OF FACT

4.Claimant first began to experience problems with her wrist in December 1990.

5.In February 1991, Claimant sought medical treatment from [Dr.P], her family doctor.

6.[Dr. P] referred Claimant to [Dr. De] who removed a ganglion cyst from Claimant's right wrist on March 1, 1991.

7.Claimant did not miss any time from work because of the removal of the ganglion cyst and continued to perform her regular duties until July 3, 1991.

8.After work on July 2, 1991, Claimant experienced swelling and pain in her wrist and she sought treatment at the emergency room of the local hospital.

9.Claimant sought follow-up medical care and was ultimately diagnosed as having Carpal Tunnel Syndrome on or after (date of injury).

10.Claimant lost time from work beginning on (date), and remained in an off work status until after wrist surgery in September 1991.

CONCLUSIONS OF LAW

2.Claimant knew or should have known that her wrist problem may be related to her employment on (date of injury).

3.Claimant's date of injury is (date of injury).

DECISION

Claimant's date of injury is (date of injury). Carrier's workers' compensation coverage terminated effective July 1, 1991, and it is not responsible for work-related injuries after that date.

Claimant maintains in her appeal that she "knew or should have known that her wrist problem may have been related to her employment as of December, 1990. Thus, [claimant's] date of injury is December, 1990." Claimant also alleged error by the hearing officer when he failed to ". . . reconvene the hearing and compel the attendance of [a witness] by subponea (sic) . . . ."

The parties, as evidenced in their respective appeal briefs, agree that claimant's carpal tunnel syndrome is a repetitious trauma injury under the definition of occupational disease in Article 8308-1.03(36). Article 8308-4.14 specifies:

> For purposes of this Act, the date of injury in the case of an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment.

Claimant argues that she "had been suffering with wrist related problems since December 1990." Claimant cites a letter report from (Dr. Sa) which states "[claimant] did indeed have the syndrome [carpal tunnel] prior to 7/1/91 and that it did not become manifest until it reached a state of presenting with obvious symptomatology thus leading to corrective surgery" and excerpts from (Dr. Sw) "that it is possible that both the carpal tunnel syndrome and the ganglion cyst were work related to the type of work that [claimant] had been performing" as evidence that claimant's "date of injury was December, 1990, accordingly, the date [claimant] knew or should have known her wrist problem may be related to her employment." We disagree. It is undisputed that claimant had pain in December 1990, but claimant herself testified she "didn't know nothing about . . . carpal tunnel syndrome." She testified "I didn't know what it was -- couldn't determine what I had." Claimant had a cyst removed in 1985 and another cyst removed on March 1, 1991. Claimant testified her hand and wrist got better for a short while after March 1991, before it got worse. Both claimant's original TWCC-41 and the amended notice of injury indicated that claimant first knew of her disease in July 1991, which is consistent with claimant's testimony. There is testimony from claimant's supervisor, who in July , stated she suggested that claimant might have an occupational disease. The hearing officer found that claimant knew or should have known that her wrist problem may be related to her employment on (date of injury), which is the date (Dr. Z) diagnosed carpal tunnel syndrome and instructed "[p]atient is not allowed to work until further notice." There is sufficient evidence from claimant, the notices of injury, and the medical reports that claimant's carpal tunnel syndrome was not diagnosed, and that therefore claimant did not know of her condition, until July. When claimant knew or should have known that her condition may be related to her employment is a factual matter. The

hearing officer, as the fact finder, is the sole judge of the relevance and materiality of the evidence as well as its weight and credibility. Article 8308-6.34(e). Where, as here, there is sufficient evidence to support his determinations, there is no sound basis to disturb the decision of the hearing officer. Only if we were to determine, which we do not in this case, that the determination of the hearing officer was so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust would we be warranted in setting aside his decision. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992.

As to the issue that the hearing officer erred in failing to reconvene the hearing and compel the attendance of a witness, we would note that after the August 26, 1992 benefit review conference, a CCH was scheduled for October 14, 1992. The employer and carrier appeared, but claimant failed to appear. The hearing officer, however, found good cause for claimant's failure to appear and rescheduled the hearing. The hearing officer did not specify what the good cause was, but from claimant's "statement" of 10-23-92 , one can infer the good cause was claimant's illness. A rescheduled CCH was held on December 16, 1992. At the end of a lengthy hearing, claimant's attorney moved for a continuance in order to obtain the testimony of a nurse employed in a management position by the employer, to corroborate claimant's testimony that she had complained of pain in her wrist in December 1990. Claimant's motion was contested by the carrier. The hearing officer several times commented about the doubtful relevancy of this witness' testimony. In order to accommodate claimant, without further delaying the case, the hearing officer at the conclusion of the December 16th hearing left the record open for the limited purpose of submitting the witness' affidavit. Claimant was to obtain the affidavit and submit it to the carrier by January 6, 1993, and the carrier would have 10 days to respond to the affidavit. The hearing officer in discussing the witness' availability stated "obviously [the affidavit] has gotta be something that [the witness] is willing to sign -- got to be her statement . . . sworn affidavit." The hearing officer cautioned "[a]t some time she [the witness] has a right to say she doesn't want to testify." Claimant was unable to get an affidavit from the witness and the hearing officer closed the record on January 12, 1993. Claimant's attorney in the appeal alleges that the hearing officer "assured all parties present [at the hearing] that in the event [claimant] was unable to obtain the cooperation of [the witness], he could and would reconvene the hearing and compel the attendance of [the witness] by subponea (sic), if necessary." What the hearing officer said, in response to a continued discussion of whether the employer would make the witness available, was "[i]f you can't get the affidavit then you let me know -- we'll deal with it where we have a -- reconvene the hearing." Perhaps the hearing officer misspoke or otherwise did not intend to reconvene the hearing, nevertheless what was actually said fairly closely corresponds with claimant's allegation. The hearing officer in effect said that if claimant could not get the witness' affidavit, to let him know and he will deal with it to include reconvening the hearing. Claimant by letter dated January 7, 1993, and acknowledged by the hearing officer to have been received on January 12, 1993, advised the hearing officer that the witness had "declined to give an affidavit or

get further involved." Although the hearing officer had warned this might happen, the hearing officer failed to specify how he would "deal with" the situation and summarily closed the record. We find that the hearing officer in failing to reconvene the hearing in the event claimant was unable to obtain the affidavit, as he had stated he would do, abused his discretion. However, abuse of discretion by the hearing office does not automatically result in reversible error. To obtain a reversal, claimant must show that the hearing officer's error in failing to reconvene the hearing as he had stated he would do was reasonably calculated to cause and probably did cause rendition of an improper decision. Hernandez v. Hernandez, 611 S.W.2d 732, 737 (Tex. Civ. App. - San Antonio 1981, no writ). Here the hearing officer expressed doubt as to the relevancy of the witness' testimony and in fact, the only reason claimant wants this witness' testimony is to corroborate claimant's testimony that she complained of pain in her wrist in December 1990. It is undisputed that claimant had pain in her wrist and so informed coworkers and others in December 1990. It is also undisputed that claimant saw Dr. P on February 26, 1991 and had a ganglion cyst removed on March 1, 1991. This is nothing the witness could add to show that claimant was aware she had carpal tunnel syndrome or other work related injury in December 1990 when claimant's own testimony and the two notices of injury she filed show that claimant first knew the disease was work related sometime in July. Consequently we find that the failure to reconvene the hearing if claimant was unable to get the affidavit of the witness as the hearing officer stated he would do, was not reasonably calculated to cause and probably did not cause the rendition of an improper decision.

Finding the evidence sufficient to support the findings and conclusion of the hearing officer, the decision is affirmed.

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Thomas A. Knapp

CONCUR:

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Susan M. Kelley
Appeals Judge

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Philip F. O'Neill
Appeals Judge